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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

TONI WOLFSON et al.,

Plaintiffs and Appellants,

v.

SELMA WOLFSON,

Defendant and Appellant.

C042266

(Super. Ct. No.
01PR01304)

Estate of FERDINAND I. WOLFSON,
Deceased.

(Super. Ct. No.
01PR01309)

TONI WOLFSON et al.,

Petitioners and Appellants,

v.

SELMA WOLFSON,

Contestant and Appellant.

Estate of FERDINAND I. WOLFSON,
Deceased.

(Super. Ct. No.
01PR01440)

TONI WOLFSON et al.,

Petitioners and Appellants,

v.

SELMA WOLFSON,

Objector and Appellant.

After the death of jeweler Ferdinand (Ferd) I. Wolfson, his three daughters, plaintiffs and petitioners Toni Wolfson, Terri Wolfson, and Stefan Key (plaintiffs), discovered their father's will left them nothing of his \$882,005 estate except one diamond ring.¹ Plaintiffs contested Ferd's 1997 will and trust, and his 2000 codicil to the will and amendment to the trust, alleging their estranged stepmother, defendant, contestant and objector Selma Wolfson, exerted undue influence on Ferd. Following a court trial, the court found the 2000 codicil the product of undue influence but found no such infirmity afflicted the 1997 will. The court admitted the 1997 will to probate.

Plaintiffs appeal, contending the trial court misapplied the law of undue influence and insufficient evidence supports the trial court's finding that the 1997 will was not the product of Selma's undue influence. Selma cross-appeals, challenging the trial court's finding that the 2000 codicil resulted from undue influence. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

As in many will contests, the facts revolve around money and familial relationships. We provide a brief chronology, followed by a discussion of the evidence produced at trial.

¹ The tangle of familial relationships necessitates the use of first names.

The Family

In 1981 Selma, 57, married Ferd, 67. Toni is the daughter of Ferd and his previous wife, Lorraine. Lorraine died in 1980. Terri is the daughter of Ferd and another prior wife. Stefan is Lorraine's daughter from a previous marriage. Selma was married previously but had no children from the marriage.

During his marriage to Lorraine, Ferd opened Hamilton Jewelers (Hamilton). At the time of Lorraine's death, the couple owned 92 percent of the company's shares, valued at \$551,531. Lorraine's estate left her half-share of the property to a trust for the benefit of Ferd, for life, and then to the three girls.

The 1995 Will

In 1995 Ferd retained attorney Don Poole for estate planning. Poole drafted a property agreement that provided all property owned equally by Ferd and Selma would be community property. Poole also drafted a will that left Ferd's interest in Hamilton to Toni, Terri, and Stefan.² Ferd left all furnishings owned prior to his marriage with Selma to his daughters and left a diamond ring to Terri.

The will left Ferd's share of the community property and the remaining balance on several promissory notes to a marital trust. The marital trust provides that the trust shall distribute income to Selma and allows Selma to invade the

² Stefan's interest was to be reduced by the amount of unpaid balance on any loans Ferd made to Stefan.

principal for her needs if the trustee determines those needs cannot be met from Selma's other financial resources. Upon Selma's death, the property remaining in the marital trust would be divided among the daughters.

The 1995 will also contains a clause disinherit anyone who contests the will. The clause specifically includes any action by Selma seeking to assert a community property interest in Ferd's separate property.

The 1997 Will

In 1997 Ferd sold his interest in Hamilton to Michael Flashman, an employee and part-owner of Hamilton. Ferd received two notes dated September 1, 1997, each in the amount of \$262,879, in exchange for his shares (Flashman notes).

Two weeks later, Ferd retained attorney George Couper to make a new will. Prior to drafting the will, Couper met with Ferd and set forth his understanding of his client's needs in a letter. Couper surmised: "You want to balance your desires to minimize estate taxes by qualifying the provisions for Selma for the marital deduction against the desire to insure that your own children receive the remainder after Selma's death."

The 1997 will poured everything over to a trust. The trust provided, at Ferd's death, for the trustee to distribute to Toni and Terri all furnishings owned by Ferd prior to his marriage to Selma. The trust left a diamond ring to Terri.

The trust then split into two trusts: Trust A and Trust B. The trustee was to allocate to Trust A all the residue of the trust assets except the Flashman notes. The Flashman notes were

allocated to Trust B. Selma would be entitled to income from Trust A for life and had the power of appointment to dispose of the assets in Trust A.

The trust further provided that Selma would be entitled to income from Trust B for life and that if the value of Trust A fell below \$20,000 and no other funds were available, the principal of Trust B could be invaded for Selma's medical needs. Upon Selma's death, the remainder of the Trust B assets is to be distributed to Toni and Terri in equal shares.

The 2000 Amendment to the Trust

In 2000 Ferd met with Couper to consider amending the trust. Couper again memorialized his understanding of Ferd's wishes: "[Y]ou instructed me to prepare amendments to your trust to provide that with the exception of a diamond ring to your daughter, Terri, all the rest of your estate was to go to Selma outright, at your death. The provisions for allocation of those Flashman . . . notes to trust B, which would be irrevocable on your death, and from which Selma would get income, are to be deleted."

The First Amendment to Trust left the entire estate to Selma except for the diamond ring left to Terri. The amendment also provides that if Selma did not survive Ferd by 60 days, the entire estate would pass to Toni and Terri.

Ferd's Death and the Aftermath

In May 2001 Ferd died. Selma filed a petition to probate Ferd's 1997 will and 2000 amendment to the trust. Toni and Terri filed a petition to probate the 1995 will. Toni, Terri,

and Stefan then filed a contest to probate of the 1997 will and a petition under Probate Code section 17200 to determine the validity of the trust and the 2000 amendment thereto. A court trial followed.

Poole's Testimony

Poole testified regarding his drafting of the original 1995 will. Poole had represented Ferd since 1994 and represented him during the sale of Hamilton.

During the Hamilton sale, Ferd signed a one page sales agreement with Flashman without seeking Poole's advice. Ferd also made other concessions during negotiations without Poole's knowledge. Worried about Ferd's susceptibility to outside influence, Poole contacted a psychiatrist to determine what kind of proof might be necessary to set aside the sales contract for undue influence. Poole also included a provision in the final sales agreement forbidding any further amendment without the signature of Ferd's counsel.

Selma disagreed with the sale. She called one of Poole's partners and told him she was going to kick Ferd out of the house and file for divorce.

While discussing estate planning, Ferd told Poole he wanted his home ultimately to pass to his children after his death. Poole prepared a deed severing the joint tenancy Ferd and Selma shared. Ferd told Poole he did not want to discuss the changes with Selma because "it would cause a great deal of consternation and unpleasantness at home."

Poole also prepared a property agreement converting joint tenancy property into community property. Poole did not send Selma a copy because Ferd directed him not to do so.

After Poole prepared the will, Ferd told him he did not want Selma to know about the will because she "would not like it and . . . she would, in effect, apply pressure to him to change it." Poole added the no contest clause specifically referring to Selma because Ferd worried Selma would make undue demands on his estate.

Couper's Testimony

Couper first met Ferd on September 15, 1997. Ferd wanted to minimize estate taxes, and Couper recommended the two trusts, A and B. Ferd told Couper he wanted Selma to be able to dispose of all their assets, except the Flashman notes, on her death. Selma did not attend the initial meeting.

Couper and Ferd met again on September 22, 1997, to go over the draft of the trust. Selma attended the meeting. Another meeting followed with both Ferd and Selma on September 29, 1997. Couper made changes to the draft of the trust. Couper was not concerned about Selma's exercising undue influence over Ferd during those meetings.

Couper never met alone with Ferd after the initial meeting. During their meetings, Ferd appeared to be functioning well for a man his age. During one meeting Selma expressed her dissatisfaction with Poole's prior representation and told Ferd his daughter Stefan was taking advantage of him. Ferd expressed his desire to take care of Selma. Selma did not participate in

the discussions during the second meeting; she did not enter the discussions about the trust or the will.

When Ferd approached Couper to amend the trust in July 2000, he was a very different man. Ferd had aged perceptibly. Ferd's memory was failing. Ferd stated only the diamond ring was to go to Terri; everything else went to Selma.

Couper feared Selma was exerting undue influence based on Ferd's advancing years and the "dramatic" changes to the trust being proposed. Couper now found Selma a "very dominant personality." He could not recall whether Selma attended the meetings. According to Couper, Ferd gave no reason for completely disinherit his daughters, stating only that he wanted to take care of Selma.

Ferd brought a note to the meeting that set forth the specific provisions of the trust he wanted amended. Although the note was in Ferd's handwriting, Couper testified Ferd was not the type of person who would direct the attorney to modify specific provisions in a document. It was much more likely Ferd would simply come to the meeting and provide informal, oral instructions expressing his ultimate desires, leaving it to the attorney to identify and make changes to the relevant provisions.

Terri's Testimony

Terri testified she and her father adored one another. Their close relationship deteriorated when Ferd married Selma. Terri felt unwelcome in the family home.

Selma disliked Terri's sisters, Stefan and Toni. Selma called both derogatory names and believed Stefan took advantage of her father. The relationship between Selma and Terri was "very strained."

Terri testified Ferd gave her \$10,000 to open an art gallery in Carmel. He also gave her money after she lost possessions during Hurricane Iniki in Hawaii. When Terri had problems paying back taxes, Ferd gave her \$3,000. Teri acknowledged Ferd gave her over \$8,000 between 1991 and 1999.

Toni's Testimony

Toni also described her relationship with Ferd as close and loving. However, she was uncomfortable visiting after Ferd married Selma. Selma denigrated both her sisters and her father, using vulgar language.

Ferd gave Toni \$20,000 to buy a jewelry store and subsequently gave her \$5,000 to buy another business. She knew of nothing that would cause Ferd to disinherit her. Toni never heard Selma threaten Ferd.

Flashman's Testimony

Flashman, who purchased Hamilton from Ferd, testified about the purchase. When Selma learned of the sale, she yelled at Ferd, called him a stupid man, and slapped him.

Harold Goldsmith's Testimony

Harold Goldsmith, a fellow jeweler and close friend of Ferd's, spoke with him frequently. When Ferd discussed his daughters in front of Selma, she would become furious. Selma made no secret of her dislike of the daughters. She said Ferd

gave them so much money they had little left for themselves. Goldsmith believed Ferd's health began to decline in 1995 and his mental state was deteriorating.

Stefan's Testimony

Stefan testified she was five years old when her mother married Ferd. She considered Ferd her father and the pair enjoyed a close relationship. The relationship changed after Ferd's marriage to Selma. Selma did not want Stefan in the house. Neither Stefan nor her children were welcome.

Ferd helped Stefan financially over the years. He paid off Stefan's second mortgage and gave her \$45,000 to purchase a dress store.

Selma's Testimony

Selma testified in both the plaintiffs' and defense cases. Although Ferd adored his children, Selma disagreed with Ferd about his gifts of money to his daughters. She believed the daughters manipulated their father. Selma objected to Ferd's generosity because she and Ferd were having their own financial difficulties. The gifts were a source of constant irritation to Selma.

Selma recalled attending a meeting with attorney Couper to prepare Ferd's 1997 will. Selma's only input during the meeting was to express her desire that the Lorraine Wolfson trust be kept separate from Ferd's estate. She had no other input during the discussions. During the meetings with Couper, Selma paid no attention to the discussions. She simply sat. Selma neither

read the will nor did Ferd tell her about it. She saw the will only after Ferd's death. Selma saw Couper twice with Ferd.

As to the 2000 codicil, Selma did not discuss or request the changes. She and Ferd never discussed the will. Selma testified she attended a meeting regarding the 2000 codicil.

Selma testified the couple had no IRA's or savings and they lived frugally. Neither had health insurance. They lived "hand to mouth," yet Ferd continued to give his daughters money.

Selma did not care for Ferd's daughters. She had nothing in common with them and they were a constant drain on the couple's finances. Selma and Ferd separated on two or three occasions because of disputes over Ferd's gifts to his daughters. However, Selma loved Ferd and wanted the marriage to last.

The Court's Order

The 1997 Will

The trial court determined plaintiffs failed to prove the 1997 will resulted from undue influence exerted by Selma over Ferd. The court found that, as husband and wife, a fiduciary relationship existed between Selma and Ferd under Family Code section 721. However, the court found Selma did not actively participate in the preparation or execution of Ferd's 1997 will.

The court found: "There is no question that Selma drove Ferd to the offices of attorney George Couper more than once during the preparation and finalization process. But Couper could not remember whether Selma was present at any of the conferences in which he and Ferd participated. When confronted

with his billing statements, which included Selma's name in the explanation of the services rendered, Couper testified that those records are computerized compilations and may not be completely accurate in some respects. Although Couper stated that the billing statements should accurately reflect his activities, he maintained that he could not recall Selma being present at all of the conferences."

The court noted that Couper testified Ferd appeared healthy and unhesitant, and Poole was satisfied with Ferd's mental capacity and ability to withstand undue influence. The court concluded Selma did not exert any undue influence or pressure during the meetings between Couper and Ferd.

As to Selma's attitude toward Ferd's daughters, the court noted: "There was a great deal of testimony regarding the mutual dislike that existed between Selma on the one hand and Children on the other. However, there was no evidence that this relationship affected the estate planning documents drafted by Couper. In fact, Couper testified that Selma never made any derogatory statements about Children."

The court found a sound reason for Ferd's desire to leave Selma more than in the 1995 will: "This was a long term marriage (17 years as of the date of the 1997 will). Ferd and Selma went through and survived some tough financial times together even requiring the refinancing [of] the family residence to secure a \$65,000.00 loan to provided [sic] needed financing for Hamilton Jewelers. Ferd gave monetary gifts and loans, some of which were not repaid, to Children during the

entire twenty years of marriage, often causing Selma to forego some of her needs." The court found the 1997 will valid and granted the petition to admit it to probate.

2000 Codicil

Conversely, the court found the 2000 codicil to be the product of undue influence. The court relied on Couper's testimony of Ferd's dramatic decline, Couper's concern about Selma's influence, and Selma's presence during meetings about the codicil. Couper observed the interaction between Selma and Ferd and found Selma a woman with a dominating personality. The court noted: "Selma's testimony often as a witness in this case certainly was consistent with that observation." The court found Selma actively participated in the preparation of the 2000 codicil.

The court also found the codicil resulted in an unnatural disposition. The court considered the family dynamics: "Undoubtedly Ferd endured untold misery and sorrow because of this relationship [the animosity between Selma and the daughters] and the evidence unfortunately shows that neither side took any affirmative steps to alleviate the situation. If anything, they elevated the animosity because of their selfishness. In spite of these circumstances and in spite of the endless grief which Selma often inflicted upon Ferd because of the gifts/loans he had made to Children, who at times were far from model children with no regard for their father's welfare but only for their personal selfishness, pleasures and

greed, Ferd loved them like few fathers encountering such circumstances would."

The court found this lifetime affection for his children made Ferd's disinheriting of them "contrary to his own free will." The court concluded because of Ferd's "weakened physical [state] and diminished mental capacity by mid-2000, the evidence clearly leads to only one inference, namely, that Selma with her domineering personality had worn down Ferd to the extent that he could no longer resist her requests, culminating in the 2000 codicil which fulfilled Selma's need to get in the last word to Children that they get nothing." The court found the 2000 codicil invalid and not entitled to probate.

Following entry of judgment, plaintiffs filed a notice of appeal. Selma filed a notice of cross-appeal.

DISCUSSION

I

A will is invalid if procured by undue influence of another. "Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency." (*Rice v. Clark* (2002) 28 Cal.4th 89, 96 (*Rice*).)

In a will contest, three elements must be concurrently present to raise a presumption of undue influence: "(1) the existence of a confidential or fiduciary relationship between the testator and the person alleged to have exerted the undue influence; (2) active participation by such a person in

preparation or execution of the will; and (3) an undue benefit to such person or another person under the will thus procured [citations].” When the contestant has shown by a preponderance of evidence the presence of these elements, the burden shifts to the proponent to prove the will was not induced by undue influence. (*Estate of Clegg* (1978) 87 Cal.App.3d 594, 602 (*Clegg*); *Rice, supra*, 28 Cal.4th at pp. 96-97.) The element of active participation in the preparation of the will may be established by circumstantial evidence. (*Clegg, supra*, 87 Cal.App.3d at p. 602.)

It is necessary to show that the undue influence effectively destroyed the testator’s free agency. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act is not enough. The undue influence must be used directly to procure the will and must amount to coercion destroying the testator’s free agency. Mere opportunity to influence the mind of the testator, even coupled with an interest or motive to do so, is not sufficient. (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182.)

II

Plaintiffs argue the court erred in finding the 1997 will was not the product of Selma’s undue influence upon Ferd. Plaintiffs challenge the trial court’s finding that Selma did not participate in the preparation of the 1997 will. In addition, plaintiffs claim the court “made erroneous findings”

as to Ferd's susceptibility to undue influence and as to whether the 1997 will's provisions were unnatural and unduly profited Selma.

In conjunction with their challenge to the court's finding that Selma did not actively participate in the formulation of the 1997 will, plaintiffs accuse the trial court of misapplying the law of undue influence. According to plaintiffs, the court required direct evidence that Selma participated in the drafting of the 1997 will. Plaintiffs contend: "We submit that the Probate Court concluded that [plaintiffs] had to prove that Selma exercised undue influence in front of Couper or that [plaintiffs] had to prove what Selma actually said to Ferd in order to prove their case."

We find no evidence in the record to support plaintiffs' claim. Neither during trial nor in its ruling did the court draw upon the dearth of direct evidence to support its finding that Selma did not actively participate in the drafting of the 1997 will.

Instead, the court carefully considered *all* the evidence adduced at trial, including testimony by Couper and Selma, the only surviving participants of the meetings. In addition, the court discussed the accuracy and validity of Couper's computerized time sheets, which listed Selma as a participant at the meetings. After discussing the evidence regarding Selma's participation in detail, the court found plaintiffs failed to prove Selma actively participated in Ferd's 1997 will. The court did not penalize plaintiffs for failing to have "a fly on

the wall” during the meetings, able to report the discussions. The court considered the totality of circumstances surrounding the 1997 will and found evidence of Selma’s direct participation lacking.

Plaintiffs also contend the court made erroneous factual findings regarding whether Selma was present during several meetings. Plaintiffs argue the evidence unequivocally established Selma’s presence. However, our review of the record reveals equivocal and contradictory testimony by Couper as to Selma’s presence. Couper simply could not remember Selma’s presence; when confronted by the billing statements, he acknowledged she might have been present.

We review a challenge to the sufficiency of the evidence under the substantial evidence rule. We determine whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court’s findings. We must view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968 (*Lenk*).)

We find sufficient evidence to support the court’s finding that plaintiffs failed to establish Selma actively participated in the 1997 will. Since we find plaintiffs failed to establish the requirement of active participation by Selma, we need not discuss plaintiffs’ contentions regarding Ferd’s susceptibility or the unnaturalness of the will’s provisions.

III

Selma cross-appeals, challenging the sufficiency of the evidence in support of the court's finding that the 2000 codicil resulted from her undue influence. Selma argues no evidence established her active participation in the preparation of the codicil, Ferd's susceptibility, or an unnatural disposition of the estate.

Plaintiffs argue Selma's cross-appeal is untimely under California Rules of Court, rule 3(e). Rule 3(e)(1) states: "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal."

Plaintiffs contend, "Since the first appeal applied only to the Probate Court's decision with respect to the 1997 will and trust, that appeal did not extend the time to appeal the Probate Court's decision with respect to the totally separate issue of the 2000 codicil to the will and trust amendment." Plaintiffs are mistaken. The judgment from which they appealed determined the validity of both the 1997 will *and* the 2000 codicil.

Again, we face a challenge to the sufficiency of the evidence in support of the trial court's ruling. Selma argues: "There must be evidence that Selma participated in the actual preparation of the trust amendment. There is no such evidence."

However, the law requires no such evidence of direct participation, and Selma cites no authority supporting such a requirement. As in its analysis of the 1997 will, the trial

court considered the totality of the circumstances surrounding the 2000 codicil. The court carefully explained its reasoning: Couper became concerned about Selma's influence and presence during the drafting of the codicil. Couper found her a dominant personality, an impression borne out by the court's own observations.

In addition, Couper testified that Ferd handed him a handwritten note during the discussions. The note identified specific provisions in the trust to be changed in order to disinherit his daughters. Couper testified he believed Ferd was a person who would orally make such revisions as opposed to providing handwritten instructions.

The court drew the inference that Couper believed the note had been prepared at Selma's suggestion. When a trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences even though different inferences may also be reasonable. (*LeVine v. Weis* (2001) 90 Cal.App.4th 201, 210.)

Selma also contends the court erred in finding Ferd susceptible to undue influence. According to Selma, although Couper suspected undue influence, "Couper satisfied himself that Ferd was not being subjected to undue influence as evidenced by the fact that Couper prepared the trust amendment as directed by Ferd."

In finding Ferd susceptible, the trial court pointed to Couper's concerns as well as Couper's testimony regarding Ferd's physical and mental decline. The trial court heard Couper's

testimony regarding Ferd's state of mind and his observations of Ferd during the meeting. The trial court judges witness credibility and draws reasonable inferences from this testimony. (*Lenk, supra*, 89 Cal.App.4th at p. 968.) We find sufficient evidence to support the trial court's conclusion that Ferd was susceptible to undue influence.

Finally, Selma argues the codicil did not result in an unnatural disposition of Ferd's estate: "As a matter of law, a will or trust leaving everything to a long term spouse should not be considered an unnatural will." Notably, Selma provides no support for this sweeping assertion, nor does the record support such a gloss on events.

As the trial court painstakingly noted, Ferd was a man caught between Scylla and Charybdis. On the one hand, a devoted father, Ferd wanted to provide for his daughters. On the other hand, such overwhelming generosity resulted in animosity at home. His affection for his daughters appeared never to waiver despite his wife's anger and disapproval. As the trial court found, Ferd's final act of disinheritting his daughters, leaving them not even the furnishings and objects from his first marriage that might hold sentimental significance for them, is contrary to his own free will.

We find sufficient evidence that the 2000 codicil resulted from undue influence.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

RAYE, J.

We concur:

DAVIS, Acting P.J.

NICHOLSON, J.